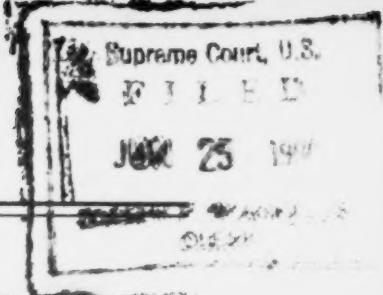


89-2006

No.



IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

WILLIAM A. ROSCOE, PETITIONER
v.
THE UNITED STATES OF AMERICA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
WITH REQUEST FOR SUMMARY REVERSAL

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P. O. Box 500
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June 1990



QUESTIONS PRESENTED

1. Whether the doctrine of sovereign immunity can be used to dismiss a case that challenges the constitutionality of a statute enacted by Congress?
2. Whether the doctrine of sovereign immunity can be used to dismiss a case that alleges a violation of the First Amendment where Internal Revenue Service agents have seized and destroyed a publishing company without any claim that said publishing company either owed any taxes or had violated any law?
3. Whether certain specific sections of 26 U.S.C. Chapter 24, known as the "withholding tax law," are unconstitutional because they delegate taxing power to the Secretary of the Treasury and to people outside of the government?
4. Whether Congress has the power to order a person it has made liable for a tax to get the money to pay the tax from one specific source as it attempts to do in 26 U.S.C. § 3402(a)?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

No.

WILLIAM A. ROSCOE, ET AL., PETITIONERS
v.
THE UNITED STATES OF AMERICA, ET AL.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
WITH REQUEST FOR SUMMARY REVERSAL

A Writ of Certiorari is respectfully sought by William A. Roscoe to review the order of the Court of Appeals affirming the order of the District Court which has dismissed petitioner's suit on the grounds the claims he has presented to both courts are barred by the Doctrine of Sovereign Immunity. It is believed that summary reversal is appropriate in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. B, infra, 5a-7a) is not reported. The opinion of the district court (App. B, infra, 7a-9a) is not reported.

JURISDICTION

The Order of the Court of Appeals was entered on May 3, 1990 and the Mandate was dated May 30, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

*The other parties listed as respondents are: Nicholas Brady, Secretary of the Treasury; Commissioner of Internal Revenue; Al Kolak, District Director of Internal Revenue; Kenneth G. (Jerry) Whitt; Bill Horton; John L. Dyess; Robert Pointer; Gary Gentry; Tommy A. Henderson; Bart J. Slattery, III; Russell D. Brackins; Evelyn Miller; Michael C. Brock; Gordon Broom and H. M. Browning.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

1. Article I, Section 1 of the United States Constitution provides:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. Article I, Section 8 then provides in part:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, * * *.

3. The First Amendment then provides in part:

Congress shall make no law...abridging the freedom of speech, or of the press; * * *.

4. The statutory provisions involved are 26 U.S.C. §§ 3402(a)(c)(d)(f), and § 3403. Also in 26 U.S.C. §§ 6011(b), 6205(a)(b), 6413(a)(b), 6414, 6501(b)(1) and (2), and 6513(c).

The pertinent texts of the foregoing are set forth in the Appendix (App. A, pp 1a-4a).

STATEMENT

1. This case originated upon the filing of a five count Complaint by William A. Roscoe in the District Court in Greeneville, Tennessee. His three corporations were joined under Fed.R.Civ.P. Rule 19 as they are needed for a just adjudication.

Count I challenged the constitutionality of the tax imposed in 26 U.S.C. § 3402 because this statute delegates taxing power vested in Congress to the Secretary of the Treasury and to people outside of the government. Jurisdiction was claimed under 28 U.S.C. § 1331.

Count II challenged employment tax assessments on numerous grounds. The plaintiffs' property had been seized and sold by agents of the Internal Revenue Service (IRS). Claims for refunds of the money realized from sales had been filed as provided in 26 U.S.C. § 7422 and had been fully disallowed. Jurisdiction was then claimed under 28 U.S.C. § 1346(a)(1).

Count III alleged five counts of fraudulent actions by agents of the IRS stated with the particularity required in Fed.R.Civ.P. Rule 9 (b). Pendant jurisdiction was claimed.

Count IV alleged a civil rights violation under 42 U.S.C. § 1985. This violation would only be applicable if at least one of the claims of fraud from Count III were proven in court. Jurisdiction was claimed under 28 U.S.C. § 1343.

Count V alleged a violation of the First Amendment by the defendants in the destruction of Roscoe Publishing, Inc. and the confiscation and illegal use of its mailing list. The defendants have publicly claimed through their attorney they wanted to destroy the credibility of William A. Roscoe because they claimed he was contaminating the minds of the people with his publication about employment taxes called *The Roscoe Report*. What better means of accomplishing their objective could be found than seizing the corporation's mailing list and sending its subscribers a levy claiming its editor, William A. Roscoe, owed over \$100,000.00 in employment taxes? However, no claim had ever been made by the IRS that Roscoe Publishing, Inc. owed any taxes, nor was it listed in the Writ obtained by the defendants to

seize the property of the other plaintiffs-petitioners in this suit. Jurisdiction was claimed under 28 U.S.C. § 1331 and pendant jurisdiction.

2. The District Court dismissed the suit under the provisions of Fed.R.Civ.P. Rule 12(b)(6) claiming the doctrine of sovereign immunity cannot be avoided by naming officers and employees of the government as defendants. *United States v. Shaw*, 309 U.S. 409 (App. B, at 8a).

Upon review, The Sixth Circuit Court of Appeals affirmed the district court's judgment pursuant to Rule 9(b)(5), Rules of the Sixth Circuit, and damages were assessed against Roscoe in the amount of \$1,200.00 under Fed.R.App.P. 38. (App. B, at 7a).

REASONS FOR GRANTING THE PETITION

The Courts Below Have Decided a Federal Question of Substance in a Way Probably Not in Accord with Applicable Decisions of This Court.

The questions presented in this petition are the constitutional questions presented in Counts I and V and whether the doctrine of sovereign immunity can be used to dismiss such questions.

1. The dismissal of this case by the District Court and the Sixth Circuit Court of Appeals using the doctrine of sovereign immunity is in direct conflict with the opinions expressed by this Court in *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682. In *Larson*, Chief Justice Vinson delivered the opinion of the Court and said (337 U.S. at 689-691):

"There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. If the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign." * * * "A second type of case is that in which the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional." * * * "These two types have frequently been recognized by this Court as the only ones in which a restraint may be obtained against government officials." The rule was stated by Mr. Justice Hughes in *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912), where he said: "...in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunctive process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments (citing cases). And it is equally applicable to a Federal Officer acting in excess of his authority or under an authority not validly conferred."

Both definitions apply to Counts I and V of the petitioner's suit. Further, none of the specifics in either Count were addressed in the opinions of the Courts Below. (App. B, pp 5a-9a).

2. In 1942 Congress created the Withholding Tax Law now incorporated into 26 U.S.C. Chapter 24. (App. A, pp 1a-4a). This law appears to have merely created a tax collection system which requires employers to collect an employee's income tax by deducting the income tax from the employee's wages and giving this money to the Internal Revenue Service (IRS). Indeed, the IRS has told employers since 1942 they are required, by law, to perform this service as stated in IRS Publication 539, titled, "WITHHOLDING TAXES AND REPORTING REQUIREMENTS", which says, "This publication discusses the requirements for withholding income and social security taxes from employee's wages." Further, it says:

"You are required by law to deduct and withhold income tax and social security tax from the salaries and wages of your employees, and you are liable for the payment of those taxes whether or not you collect them from your employees." (Emphasis theirs).

Neither of the above statements is true!

3. There is no question Congress used its taxing power to impose a tax in 26 U.S.C. Chapter 24, § 3402. Congress has admitted in nine sections of the Tax Code that it imposed a tax in § 3402 of Chapter 24 (see App. A, pp 2a-4a). This employment tax is an excise tax on wages; further, The Commissioner of Internal Revenue has admitted in Tax Court this "withholding tax" is not an employee's income tax (App. B, pp 9a-10a). Finally, Congress has not made any employee liable for this excise tax on wages. A definitive analysis of the withholding tax is contained in Appendix C, pages 11a to 23a. This publication, *A Secret Tax*, copyright © 1988, Roscoe Publishing, Inc., is an example of the writing this corporation was publishing at the time it was seized and destroyed by the defendants in this suit.

To impose this excise tax, Congress must have used the taxing power contained in Article I, Section 8 of the Constitution of the United States. The petitioner believes the Withholding Tax Law contains four separate constitutional violations. Three are direct delegations of taxing power which are in violation of Article I, Section 1 of our Constitution which reads:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Congress alone has been given the power to tax and it cannot delegate this taxing power to make it appear it has merely created a tax collection system. With the use of misleading chapter headings, section headings and tag lines, and, of course, the misnomer, "withholding" tax, Congress has attempted to cover-up this use of its taxing power. However, even a casual analysis of this law easily exposes the fact that the taxing power has been used. This fact, added to the facts the employee is not liable for the payment of this employment tax, and this withholding tax is not an employee's income tax, puts an entirely different light on this statute from the one presented to employers by the Internal Revenue Service.

While there are not many restrictions on the taxing power, three are certain. The power to tax includes the power to say what shall be taxed, who shall pay the tax, and finally, how much the tax will be. *U.S. v. Smith*, D.C. Mich. 1945, 62 F.Supp. 594. When Congress wrote the words in § 3402(a), "a tax determined in accordance with tables or computational procedures prescribed by the Secretary.", it violated the third of the above three powers. Again, in § 3402(f), when Congress wrote, "an employee receiving wages shall on any day be entitled to the following withholding exemptions:", Congress delegated to employees the power to determine how much of their wages will be taxed to their employer. Then again, in § 3402(d), when Congress wrote, "If... thereafter the tax against which such tax may be credited is paid, the tax...shall not be collected from the employer;", Congress has delegated to employees the power to determine whether or not the employment tax it imposed on wages will be collected from the employer.

The final constitutional question is the wording in § 3402(a) itself which reads, "except as otherwise provided in this

section, every employer making payment of wages shall deduct and withhold upon such wages a tax..." Keeping in mind this tax is not an employee's income tax and the employee has not been made liable for the excise tax Congress has imposed in this section, where would Congress get the power to order an employer to take money from an employee's wages to pay this tax? The petitioner does not believe our Constitution has given Congress the power to tell any person where to get the money to pay any tax it has imposed. Finally, in § 3403, Congress has said, "The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter..." As Congress has written this law, it now appears that the liability for the payment of this employment tax has not been legally imposed upon anyone!

4. The tax Congress imposed in 26 U.S.C. Chapter 24 is euphemistically called "withholding tax." The knowledge withheld in this law is the truth: Congress used its taxing power to impose a tax on wages; then Congress made employers alone liable for the payment of this employment tax. Congress has given employers the freedom (In § 3402(c) which begins with the words, "At the election of the employer" and includes the words, "in lieu of the tax required to be deducted and withheld under subsection (a)), to take money out of their employee's wages and give it to IRS. Congress then gave employers legal protection against any legal complaint by the employee against this act of theft when it wrote in § 3403, "The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of such payment." Then, in § 31, Congress gave employees the legal right to use the amount of the tax imposed on wages in § 3402(a) as a credit against the employee's income tax. This legal right to use the tax imposed on wages as a credit against an employee's income tax does not change the excise tax called "withholding tax" into the employee's income tax. In a case decided in this Court in 1978, *Central Illinois Public Service, Co., v. United States*, 435 U.S. 21, Mr. Justice Blackmun said:

"Decided cases have made the distinction between wages and income and have refused to equate the two in withholding or similar controversies."

In a brief filed with the United States Tax Court in *Roscoe v. Commissioner of Internal Revenue*, 48 T.C.M.(CCH) 1078 (1984) Docket No. 2085-83, filed with the U.S. Tax Court on July 26, 1984 by Fred T. Goldberg, Jr. (App.C, pp 9a), the Commissioner of Internal Revenue is quoted as saying, "Petitioners argue that the withholding tax is not the same thing as the employee's income tax. Respondent agrees. As previously discussed, the withholding tax is a means whereby the government collects a portion of the employee's wages as an estimate of his income tax at the source by making the employer liable for the amounts of the taxes to be withheld. The income tax on individuals as the petitioners note on Br 5 is imposed by a different section of the Internal Revenue Code and is a separate tax from the withholding tax..."

5. Under our Constitution, Congress alone has been given the power to determine how much every tax will be; it cannot delegate this responsibility to the Secretary of the Treasury. If it wants to place a tax on wages, it alone must decide how much of a person's wage, if less than all, will be taxed; it cannot delegate that responsibility to an employee who has no liability for the tax imposed on his or her wages. Further, Congress cannot give an employee the power to determine whether a tax imposed upon an employer will be collected from that employer. Finally, while Congress has the power to tax just about every action a citizen can make, it does not have the power to tell a person it has taxed where that person must get the money to pay the tax.

6. None of the challenges to the constitutionality of the withholding tax law have ever been adjudicated in a Court of Law; therefore, the challenge the petitioner has made is still viable and falls under the definition of cases where restraint may be obtained against the conduct of a government official.

While the order of the District Court says, "There is no question the challenged law is constitutional.", the cases cited (App. B at 8a) have no bearing what-so-ever upon the specifics in the

claim of unconstitutionality presented in this case. For the District Court, or the Appeals Court, to use the doctrine of sovereign immunity, as both have done, to stop the adjudication of a claim that a statute is unconstitutional, effectively destroys the possibility of most citizens ever challenging a law the government does not want tampered with, no matter how unconstitutional its provisions might be. That is precisely the situation presented to this Court in this case.

7. It will not be difficult for Congress to make the changes needed to bring this employment tax law into compliance with the clear wording in our Constitution that all legislative powers granted are vested in Congress. The petitioner desires a ruling by this Court that the taxing power granted exclusively to Congress in our Constitution cannot be delegated to make an employment tax appear to be a tax collection system. This ruling will put some truth, honesty and justice back into our tax code, and it should eliminate the present practice of the Secretary of the Treasury creating Treasury Regulations that are in conflict with the law. A final value: the employees of the Internal Revenue Service will no longer find it necessary to lie to employers about how our employment taxes are designed and how they function.

CONCLUSION

For the reasons stated above, the decision of the District Court and the Appeals Court in this case should be reversed and the case remanded for trial; the challenged sections of the tax law should be declared unconstitutional.

Summary reversal is also appropriate in this case. It is consistent with this Court's practice in cases not only where the law is settled by a prior decision but also where the action of the lower court was clearly improper. A ruling should be made by this Court that the doctrine of sovereign immunity cannot be used to dismiss a case where a definitive challenge is made to the constitutionality of a law enacted by Congress. Finally, the doctrine of sovereign immunity cannot be used to dismiss a suit which claims a violation of the First Amendment.

Respectfully submitted.

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June 1990

APPENDIX A
CONSTITUTIONAL AND STATUTORY PROVISIONS
INVOLVED

Constitution of the United States

The Constitutional provisions involved are set forth on page 2 of the Writ.

Internal Revenue Code of 1988, 26 U.S.C.

(Herewith are set forth excerpts from 26 U.S.C. Chapter 24)

**CHAPTER 24-COLLECTION OF INCOME TAX AT SOURCE
ON WAGES**

§ 3402. Income tax collected at source

(a) Requirement of withholding.-

(1) In general.-Except as otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures prescribed by the Secretary. Any tables or procedures prescribed under this paragraph shall-

(A) apply with respect to the amount of wages paid during such periods as the Secretary may prescribe, and

(B) be in such form, and provide for such amounts to be deducted and withheld, as the Secretary determines to be most appropriate to carry out the purposes of this chapter and to reflect the provisions of chapter 1 applicable to such periods.

(2) Amount of wages.-For purposes of applying tables or procedures prescribed under paragraph (1), the term amount of wages means the amount by which the wages exceed the number of withholding exemptions claimed multiplied by the amount of one such exemption. The amount of each withholding exemption shall be equal to the amount of one personal exemption provided in section 151(b), prorated to the payroll period. The number of withholding exemptions permitted shall be calculated in accordance with regulations prescribed by the Secretary under this section, taking into account any reduction in withholding to which an employee is entitled under this section.

(c) Wage bracket withholding.-

(1) At the election of the employer with respect to any employee, the employer shall deduct and withhold upon the wages paid to such employee a tax (in lieu of the tax required to be deducted and withheld under subsection (a)) determined in accordance with tables prescribed by the Secretary in accordance with paragraph (6).

(6) In the case of wages paid after December 31, 1969, the amount deducted and withheld under paragraph (1) shall be determined in accordance with tables prescribed by the Secretary. In the tables so prescribed, the amounts set forth as amounts of wages and amounts of income tax to be deducted and withheld shall be computed on the basis of the table for an annual payroll period prescribed pursuant to subsection (a).

(d) Tax paid by recipient.-If the employer, in violation of the provisions of this chapter, fails to deduct and withhold the tax under this chapter, and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer; but this subsection shall in no case relieve the employer from liability for any penalties or additions to the tax otherwise applicable in respect of such failure to deduct and withhold.

(f) Withholding exemptions.-

(1) **In general.**-An employee receiving wages shall on any day be entitled to the following withholding exemptions:

* * *

§ 3403. Liability for tax.

The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of such payment.

§ 6011. General requirement of return, statement or list

(b) Identification of taxpayer.-The Secretary is authorized to require such information with respect to persons subject to the taxes imposed by chapter 21 or chapter 24 as is necessary or helpful in securing proper identification of such persons.

§ 6205. Special rules applicable to certain employment taxes

(a) Adjustment of tax.-

(1) General rule.-If less than the correct amount of tax imposed by section 3101, 3111, 3201, 3221, or 3402 is paid with respect to any payment of wages or compensation, proper adjustments, with respect to both the tax and the amount to be deducted, shall be made, without interest, in such manner and at such times as the Secretary may by regulations prescribe.

(b) Underpayments.-If less than the correct amount of tax imposed by sections 3101, 3111, 3201, 3221, or 3402 is paid or deducted with respect to any payment of wages or compensation and the underpayment cannot be adjusted under subsection (a) of this section, the amount of the underpayment shall be assessed and collected in such manner and at such times (subject to the statute of limitations properly applicable thereto) as the Secretary may by regulations prescribe.

§ 6413. Special rules applicable to certain employment taxes

(a) Adjustment of tax.-

(1) General rule.-If more than the correct amount of tax imposed by section 3101, 3111, 3201, 3221, or 3402 is paid with respect to any payment of remuneration, proper adjustments, with respect to both the tax and the amount to be deducted, shall be made, without interest, in such manner and at such times as the Secretary may by regulations prescribe.

(b) Overpayments of certain employment taxes.-If more than the correct amount of tax imposed by section 3101, 3111, 3201, 3221, or 3402 is paid or deducted with respect to any payment of remuneration and the overpayment cannot be adjusted under subsection (a) of this section, the amount of the overpayment shall be refunded in such manner and at such times (subject to the statute of limitations properly applicable thereto) as the Secretary may by regulations prescribe.

§ 6414. Income tax withheld

In the case of an overpayment of tax imposed by chapter 24, or by chapter 3, refund or credit shall be made to the employer or to the withholding agent, as the case may be, only to the extent that the amount of such overpayment was not deducted and withheld by the employer or withholding agent.

§ 6501. Limitations on assessment and collection

(b) Time return deemed filed.-

(1) Early return.-For purposes of this section, a return of tax imposed by this title, except tax imposed by chapter 3, 21 or 24, filed before the last day prescribed by law or by regulations promulgated pursuant to law for the filing thereof, shall be considered as filed on such last day.

(2) Return of certain employment taxes and tax imposed by chapter 3.-For purposes of this section, if a return of tax imposed by chapter 3, 21, or 24 for any period ending with or within a calendar year is filed before April 15 of the succeeding calendar year, such return shall be considered filed on April 15 of such calendar year.

§ 6513. Time return deemed filed and tax considered paid

(c) Return and payment of social security tax and income tax withholding.-Notwithstanding subsection (a), for purposes of section 6511 with respect to any tax imposed by chapter 3, 21, or 24* * *.

APPENDIX B THE DECISIONS BELOW

(Here are set forth successively, the opinion of the U. S. Court of Appeals for the Sixth Circuit; the opinion of the U. S. District Court for the Eastern District of Tennessee, Northeastern Division; and an opinion of the Commissioner of Internal Revenue regarding the tax imposed by 26 U.S.C. Chapter 24, as filed in The United States Tax Court.

No. 89-6006
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM A. ROSCOE, ET AL.	) NOT RECOMMENDED FOR
	) FULL TEXT PUBLICATION
Plaintiff, Appellant	) Sixth Circuit Rule 24 limits citation
	) to specific situations. Please see
v.	) Rule 24 before citing in a proceeding
	) in a court in the Sixth Circuit. If
UNITED STATES OF AMERICA )	) cited, a copy must be served on other
ET AL.	) parties and the Court.
Defendants, Appellees.	) This notice is to be prominently
	) displayed if this decision is
	) reproduced.

BEFORE: MARTIN and BOGGS, Circuit Judges; and JOINER, Senior District Judge.

William A. Roscoe, a pro se Tennessee resident, appeals the district court's dismissal of his tax protest suit filed pursuant to 28 U.S.C. §§ 1331, 1343 and 1346, and 42 U.S.C. § 1985. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and the briefs, this panel unanimously agrees that oral argument is not needed. Fed.R.App.P. 34(a).

Roscoe is a former business owner who characterizes this action as an employment tax case. He sued the United States and various officials and employees of the Internal Revenue Service (IRS) alleging that the withholding tax law, 26 U.S.C. § 3401 et seq., is unconstitutional because it conflicts with the taxing power conveyed to Congress by the United States Constitution. Roscoe also alleges that his civil rights have been violated by the

defendants who have sought to enforce the illegal tax. Roscoe requested: (1) The withholding tax statute be declared unconstitutional; (2) abatement of taxes illegally assessed; and (3) recovery of money damages for the violation of his constitutional rights.

The district court dismissed the complaint pursuant to Fed.R.Civ.P. 12(b)(6) for plaintiff's failure to state a claim upon which relief could be granted. The court found that sovereign immunity barred suit against the United States, and that the officials and employees of the IRS were entitled to qualified immunity. The court later denied Roscoe's motion to vacate its order.

On appeal, Roscoe reasserts his claims, and the defendants have requested sanctions under Fed.R.App.P. 38.

Upon review, we affirm the district court's judgment. Roscoe's claims against the United States and the individual defendants (while acting in their official capacities) are barred by sovereign immunity because the United States has not consented to be sued in respect to actions connected with the assessment or collection of taxes. See 28 U.S.C. § 2680(c); *Ecclesiastical Order of the Ism of Am v. Chasin*, 845 F.2d 113 (6th Cir. 1988)(per curiam).

Likewise, to the extent Roscoe claimed that the individual defendants acted in their individual capacities, the relief sought is barred by qualified immunity because defendants did not violate any of Roscoe's clearly established statutory or constitutional rights. See *Mitchell v. Forsyth*, 472 U.S. 511 517 (1985). Roscoe also failed to state a claim under 42 U.S.C. § 1985 because he did not allege that he was the victim of racial or other class-based animus. See *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

Finally, we conclude that this case is appropriate for imposition of damages pursuant to Fed.R.App.P. 38 because the arguments presented in this appeal are clearly frivolous. See *Schoffner v. Commissioner*, 812 F.2d 292, 294 (6th Cir. 1987) (per curiam); *Martin v. Commissioner*, 753 F.2d 1358, 1361 (6th Cir. 1985).

Accordingly, the district court's judgment is affirmed pursuant to Rule 9(b)(5), Rules of the Sixth Circuit, and damages are hereby assessed against Roscoe in the amount of \$1,200.00 under Fed.R.App.P. 38.

ENTERED BY ORDER OF THE COURT

S _____

Clerk

No. CIV.-2-89-128

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

WILLIAM A. ROSCOE, ET AL.)

)

v.)

)

UNITED STATES OF AMERICA)

ET AL.)

ORDER

This is a federal tax case. The matter is before the Court upon the government's motion to dismiss. (Doc. 7).

Plaintiffs bring suit "to have this court declare invalid the the withholding tax law . . .", claiming it "conflict(s) with the taxing powers conveyed to Congress...." Plaintiff William A. Roscoe also raises a claim that the withholding statutes have been used by officers and agents of the United States to violate his constitutional rights under the first, fourth, fifth, ninth and tenth amendments. For their remedy, plaintiffs seek abatement of taxes illegally assessed and damages for violations of plaintiff's civil rights.

Plaintiff's suit may be characterized as both an action for refund of taxes, and a tort action. Actions for refund of taxes are governed by 26 U.S.C. § 7422, while tort actions against the United States are governed by 28 U.S.C. §§2671 et seq. *Scott v. IRS*, 622 F. Supp. 537 (E.D. Tenn. 1985). Under the Federal Tort Claims Act, tort actions are prohibited which arise with respect to the assessment and collection of taxes. *Id.* Plaintiffs' action at its core relates to the assessment and

collection of tax. Therefore, the doctrine of sovereign immunity bars plaintiffs from prosecuting in this case an action for tort against the United States.

The doctrine of sovereign immunity cannot be avoided by naming officers and employees of the government as defendants. *United States v. Shaw*, 309 U.S. 495, 500-501. Therefore, the plaintiffs cannot recover against the individual defendants for official acts related to the assessment and collection of tax. See *Bothke v. United States*, 670 F. Supp. 285, 287 (C.D.Cal. 1987).

The statute governing plaintiffs' claim for refund of taxes, 26 U.S.C. § 7422, provides that suit can be maintained against only the United States. *Id.* at paragraph (f). Therefore, the plaintiffs' claim for refund of taxes is barred against all the defendants in this case except for the United States.

Agents and employees of the IRS have qualified immunity. *Ecclesiastical Order of the Ism of Am. Inc. v. Chasin*, 653 F. Supp. 1200, 1205 (E.D.Mich. 1986), *aff'd*, 845 F.2d 113 (C.A. 6, 1988). Under this doctrine, civil rights actions are barred unless the individuals are alleged to have violated clearly established constitutional or statutory rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The plaintiff's complaint does not make these requisite allegations. Indeed, this would be impossible because the plaintiffs instituted this lawsuit to declare unconstitutional the laws underlying the actions taken by the defendant IRS agents. Consequently, they have qualified immunity, barring the plaintiffs' civil rights claim. Regardless, the Court notes that the statute underlying plaintiffs' civil rights claim, 42 U.S.C. § 1985, requires the allegation that the purported conspirators were motivated by invidious discriminatory intent. See *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). No such allegation having been made, the plaintiffs' civil rights claim fails to state a cause of action under 42 U.S.C. § 1985.

Plaintiffs' claim for refund of taxes is wholly based on the contention that "26 U.S.C. Chapter 24 is unconstitutional." However, there is no question that the challenged law is constitutional. See e.g., *United States v. American Friends Serv. Comm.*, 419 U.S. 7 (1974). Specifically, there is no constitutional

proscription against requiring employers to withhold deductions from their employees' salaries, wages, and other forms of compensation. *See, eg., Central Illinois Public Service Co. v. United States*, 435 U.S. 21 (1978).

Equally constitutional are the requirements that the employer of the taxpayer collect the tax for Old Age, Survivors, and Disability insurance; and the liability of the employer for its payment. *See e.g., Gephart v. United States*, 818 F.2d 469 (C.A. 6, 1987). Furthermore, the tax imposed on employers under the Federal Unemployment Tax Act is constitutional. *See e.g., Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).

A motion to dismiss under FedR.Civ.P. 12(b)(6) is granted only when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1956). Based on the foregoing discussion and pursuant to this rule, the Court GRANTS the government's motion to dismiss. This claim is ORDERED dismissed with prejudice.

ENTER:

S _____
THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

(Excerpts from an opinion of the Commissioner of Internal Revenue Service contained in a brief filed with the U. S. Tax Court in *Roscoe v. Commissioner of Internal Revenue*, 48 T.C.M.(CCH) 1078 (1984))

DOCKET NO 2058-83
UNITED STATES TAX COURT

EXCERPTS FROM
RESPONDENT'S BRIEF IN ANSWER

Beginning on Br 4, petitioners argue the withholding tax is not the same thing as the employee's income tax. Respondent agrees. As previously discussed, the withholding tax is a means whereby the government collects a portion of the employee's wages as an estimate of his income tax at the source by making the employer liable for the amounts of the taxes to be withheld. The income tax on individuals as the petitioners note on Br 5 is imposed by a different section of the Internal Revenue Code and is a separate tax from the withholding tax, but the two taxes are closely related since the latter is a means whereby the income tax is collected from the employee's wages by the employer.

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APPENDIX C

THE ROSCOE REPORT Part III

A *SECRET* TAX

The **SOURCE** of the "**AWESOME**" **POWERS** of IRS

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A secret tax has existed in the Internal Revenue Code for the past 46 years that cannot stand under the light of truth, honesty or justice. In 1987 the Internal Revenue Service (IRS) used this hidden tax to collect over \$322 billion dollars from employers who have little knowledge such a tax exists. The secret tax is disguised and hidden in section 3402 of Chapter 24 of the Internal Revenue Code in the Sub-Title called "Employment Taxes." The secret tax is called "withholding tax" and most employees will immediately say, "Why, that is not a secret tax at all; that is my income tax." This is not true but is exactly what the IRS has told us since 1944. IRS Publication 539 titled, "**WITHHOLDING TAXES AND REPORTING REQUIREMENTS**" says, "This publication discusses the requirements for withholding income and social security taxes from employee's wages." Then it tells employers:

"You are required by law to deduct and withhold income tax and social security tax from the salaries and wages of your employees, and **you are liable for the payment of those taxes whether or not you collect them from your employees.**" (Emphasis theirs).

Neither of the above statements is true!

This report exposes the following facts as recorded in the Internal Revenue Code of 1988 and the Federal Tax Regulations of 1988 as published by West Publishing Co., St. Paul, Minnesota (Emphasis has been added editorially to excerpts from the above).

1. Congress imposed a tax in section 3402 of our tax laws.
2. Congress disguised the tax which hid this use of its taxing power.

3. The law has never required employers to collect income tax.
4. Only IRS Regulations require employers to collect income tax.
5. By covering-up the truth, this tax law, as enacted, is impotent!

Because of the complexity of our tax laws, this report deals only with facts in the law relating to withholding tax in Chapter 24 of the Internal Revenue Code. However, the function occurs with all employment taxes; the money deducted from employee's wages by their employer under orders from IRS, such as stated above, is all assessed and credited by IRS into the employer's tax account. None is ever assessed into an employee's tax account.

In 1987 IRS collected a total of \$886.3 billion dollars. Of this total, \$599.5 billion dollars, approximately 67%, came from employment taxes IRS assessed on about 6 million employers. (This is less than 3% of our total population). This report is written primarily for those 6 million employers who have a right to know the truth about how our Congress has used the taxing authority we have helped delegate to it in our Constitution.

After examining the five facts listed above as they appear in the law, employers should reach the inescapable truth the Internal Revenue Service has lied about how our employment taxes were designed and how they really function.

Note: Tax figures in this report were taken from the Annual Report of the Commissioner of Internal Revenue Service for 1987.

FACT 1. CONGRESS IMPOSED A TAX IN SECTION 3402 OF OUR TAX CODE.

Here is proof of the first fact.

§ 6205 Special rules applicable to certain employment taxes

(a) Adjustment of tax..

(1) General rule.-If less than the correct amount

of tax imposed by section 3101, 3111, 3201, 3221, or 3402 is paid with respect to any payment of wages or compensation, proper adjustments, with respect to both the tax and the amount to be deducted, shall be made, without interest, in such manner and at such times as the Secretary may by regulations prescribe.

Section 6205 quoted above from the Internal Revenue Code clearly says a tax was imposed by section 3402. Congress has admitted in eight other sections of the tax code it imposed a tax in either Chapter 24 or section 3402 which created the withholding tax.

FACT 2. CONGRESS DISGUISED THE TAX WHICH HID THIS USE OF ITS TAXING POWERS.

The proof of the second fact must now be found in section 3402 in Chapter 24 of Subtitle C called Employment taxes.

SUBTITLE C EMPLOYMENT TAXES

CHAPTER 24-COLLECTION OF INCOME TAX AT SOURCE ON WAGES

§ 3402. Income tax collected at source

(a) Requirement of withholding.-

(1) In general.-Except as otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures prescribed by the Secretary.

Section 3402(a) shown above surely does not appear to have imposed a tax. The chapter heading and catch line after § 3402 both indicate this section should deal with the collection of income tax. Since Congress has admitted it imposed a tax in section 3402, these could be part of the disguise, especially since there is no mention of any "collection of income tax" in the body of the law. The law will soon prove this is the *secret* tax Congress imposed in this section. Please note the imperative, "every employer making payment of wages shall deduct and withhold upon such wages a tax..." This imperative will be fully discussed later. (Not shown here is section 3402(b) which provides a

percentage method of withholding). However, note the "exception" provided in § 3402(a) because an interesting exception is coming up in § 3402(c) quoted below.

§ 3402(c) Wage bracket withholding

(1) At the election of the employer with respect to any employee, the employer shall deduct and withhold upon the wages paid to such employee a tax **(in lieu of the tax required to be deducted and withheld under subsection (a))** determined in accordance with tables prescribed by the Secretary in accordance with paragraph (6).

(6) In the tables so prescribed, the amounts set forth as amounts of wages and **amounts of income tax to be deducted and withheld** shall be computed on the basis of the table for an annual payroll period prescribed pursuant to subsection (a).

The law in § 3402(c) quoted above and referring back to § 3402(a) says there is a tax where Congress admitted it imposed a tax. This proves the second fact: Congress disguised the tax which hid this use of its taxing power. The chapter and section headings are an essential part of the disguise. To be honest the law should have read as follows

(a) § 3402 (a) Requirement of withholding.-

(1) **In general.**-Except as otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages a *(secret)* tax computed in accordance with tables or computational procedures prescribed by the Secretary.

FACT 3. THE LAW HAS NEVER REQUIRED EMPLOYERS TO COLLECT INCOME TAXES.

Please return to section 3402(c) above to see some other interesting facts before going on.

1. § 3402(c) refers to a tax "in lieu of the *(secret)* tax."
2. § 3402(c) says this tax is "at the election of the employer."
3. § 3402(c) is the only place in Chapter 24 where the words "income tax to be deducted and withheld" are used in the body of the law.

This proves Fact 3. The law has never required employers to collect income tax. Here in section 3402(c), which begins with the words, "At the election of the employer," is the only place in Chapter 24 where such a requirement is stated in the body of the law. This phrase precludes making this a legal requirement employers must collect income tax as claimed by IRS. However, § 3402(d) quoted below puts into question whether any tax collected under the provisions of Chapter 24 could possibly be the employee's income tax. The word "tax" is used six times in § 3402(d) without any indication as to which is which. Please note, though, one of the unnamed taxes may be credited against the other unnamed tax.

§ 3402(d) Tax paid by recipient.-If the employer, in violation of the provisions of this chapter, fails to deduct and withhold the tax under this chapter, and thereafter **the tax against which such tax may be credited** is paid, the tax so required to be deducted and withheld shall not be collected from the employer; but this section shall in no case relieve the employer from liability for any penalties or additions to the tax otherwise applicable in respect of such failure to deduct and withhold.

A look at two sections in Chapter 1 of Subtitle A which imposed the income tax should aid in understanding which is which. First, section 1:

§ 1. Tax imposed

(a) Married individuals filing joint returns and surviving spouses.-There is hereby imposed on the taxable income of-

(1) every married individual...who makes a single return jointly with his spouse...a tax determined in accordance with the following table:

If taxable income is	the tax is;
Not over \$29,750	15% of taxable income
Over \$29,750	\$4,462.50 plus 28% of excess over \$29,750.

Section 31 then allows a credit against the income tax imposed in section 1 above.

§ 31. Tax withheld on wages

(a) Wage withholding for income tax purposes.-

(1) In general.-The amount withheld as tax under chapter 24 shall be allowed to the recipient of the income as a credit against the tax imposed by this subtitle.

The law says the tax under chapter 24 (which has already been identified as the *(secret)* tax) is allowed as a credit against the *(income)* tax imposed by chapter 1. The six uses of the word "tax" in § 3402(d) can now be identified as follows:

§ 3402(d) (Income) Tax paid by recipient.-If the employer, in violation of the provisions of this chapter, fails to deduct and withhold the *(secret)* tax under this chapter, and thereafter the *(income)* tax against which such *(secret)* tax may be credited is paid, the *(secret)* tax so required to be deducted and withheld shall not be collected from the employer; but this subsection shall in no case relieve the employer from liability for any penalties or additions to the *(secret)* tax otherwise applicable in respect of such failure to deduct and withhold.

If there was still any question the law has never required employers to collect income tax, that question should have been dispelled by now. Any tax under chapter 24, even the tax under section 3402(c), cannot be the employee's income tax and therefore must be the *secret* tax. This further proves facts one and two: Congress imposed a tax in section 3402, then disguised the tax it imposed. This explains why Congress couldn't identify which tax was which in § 3402(d). Does the IRS know the above facts? Of course! Here is their corresponding regulation to § 3402(d) in the law:

§ 31.3402(d)-1 Failure to withhold.

If the employer in violation of the provisions of section 3402 fails to deduct and withhold the tax, and thereafter **the income tax against which the tax under section 3402 may be credited is paid**, the tax under section 3402 shall not be collected from the employer.

Can there be any further doubt the *secret* tax Congress imposed in section 3402 is not the employee's income tax? The new, hidden fact now exposed in both the law and the regulations is: this *secret* tax is allowed, by law, as a credit against an employee's income tax.

FACT 4. ONLY IRS REGULATIONS REQUIRE EMPLOYERS TO COLLECT INCOME TAXES.

The fourth fact should be easy to prove. Compare the law with the regulations, side by side. It is difficult to believe, after reading the above regulation, the Secretary of the Treasury would write other regulations claiming employers are required, under section 3402 of our tax code, to collect income taxes from employees; however, here they are:

INTERNAL REVENUE CODE	TREASURY REGULATIONS
<p>§ 6205. Special rules applicable to certain employment taxes</p> <p>(a) Adjustment of tax.-</p> <p>(a) General rule.-If less than the correct amount of tax imposed by section 3101, 3111, 3201, 3221, or 3402 is paid with respect to any payment of wages or compensation, proper adjustments, with respect to both the tax and the amount to be deducted, shall be made, without interest, in such manner and at such time as the Secretary may by regulations prescribe.</p>	<p>§ 31.6205-1 Adjustments of underpayments.</p> <p>(a) In general. (1) An employer who makes, or has made, an undercollection or underpayment of-</p> <p>(i) Employee tax under section 3101, employer tax under section 3111, etc.</p> <p>(ii) Employee tax under section 3201, employer tax under 3221, etc.</p> <p>(iii) Income tax required under section 3402 to be withheld, with respect to any payment of wages or compensation, shall correct such error as provided in this section.</p>

The fourth fact, "Only IRS Regulations required employers to collect income taxes.", is sharply pointed out in the above comparison of § 6205 in the Internal Revenue Code with the corresponding section of the Federal Regulations. The law says a tax was imposed in section 3402 and makes no attempt to identify either use of the word "tax." The catchline after § 6205

indicates this section should refer to "employment taxes" but this distinction is not made in the body of the law either. The Regulations completely ignore the fact Congress imposed a tax in section 3402 and then refers to "Income tax required under section 3402 to be withheld." Do all Treasury Regulations ignore the fact a tax was imposed in section 3402? Most do, but one doesn't. Regulation § 31.6413(b)-1, states it clearly as follows:

§ 31.6413(b)-1 Overpayments of certain employment taxes.

For provisions relating to the adjustment of overpayments of **tax imposed by section 3101, 3111, 3201, 3221, or 3402**, see § 31.6413(a)-2.

For provisions relating to refunds of **tax imposed by section 3402**, see §§ 31.6402(a)-1 and 31.6414-1.

Finally, let's now compare the law under section 3402 with the corresponding regulations written by the Secretary of the Treasury for further confirmation of the fourth fact.

INTERNAL REVENUE CODE	TREASURY REGULATIONS
<p>§ 3402. Income tax collected at source</p> <p>(a) Requirement of withholding.</p> <p>(1) In general. Except as otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages a (<i>secret</i>) tax determined in accordance with tables or computational procedures prescribed by the Secretary.</p>	<p>§ 31.3402(a)-1 Requirement of withholding</p> <p>(a) Section 3402 provides alternate methods, at the election of the employer, for use in computing the amount of income tax to be collected at source on wages.</p> <p>(b) The employer is required to collect the tax by deducting the amount thereof from the employee's wages as and when paid, either actually or constructively.</p>

Here again the law as enacted by Congress refers to an unnamed tax which has already been identified as the *secret* tax Congress imposed and then disguised in section 3402. The regulations used by IRS claim this same section "provides alternate methods, at the election of the employer, for use in computing the amount of income tax to be collected at source on wages." The fact a tax was imposed here is ignored.

FACT 5. BY COVERING-UP THE TRUTH, THIS TAX LAW, AS ENACTED, IS IMPOTENT!

The proof of the final fact, "By covering-up the truth, this tax law, as enacted, is impotent!", is in the section of the law imposing the liability for the tax imposed in section 3402 of chapter 24. This is in section 3403 quoted below:

§ 3403. Liability for tax.

The employer shall be liable for the payment of the **tax required to be deducted and withheld under this chapter**, and shall not be liable to any person for the amount of any such payment.

The fatal flaw in the law occurs here!

The law Congress enacted says the employer shall be liable for the payment of **the tax required to be deducted and withheld under this chapter**. The law does not say, "The employer shall be liable for the payment of the income tax required to be deducted and withheld under this chapter," as IRS has told employers in its publications. Neither does the law say the employer making payment of wages shall be liable for the payment of the tax under this chapter.

It has been proven the tax under chapter 24 is the *secret* tax, not the employee's income tax as Congress has tricked us into believing by disguising the *secret* tax, thus allowing IRS to claim this *secret* tax is the employee's income tax. With the use of misleading chapter headings, section headings, and the mis-nomer, "withholding" tax, Congress has covered-up the truth it used its taxing power to impose a tax in section 3402. Then, believing its own scam, Congress has been caught in its own

petard. There never has been any liability imposed on any employee for this *secret* tax. Therefore this *secret* tax cannot be deducted from an employee's wages. For Congress to require employers to take money from employees for a tax they do not owe would be out-and-out theft. How Congress disposed of that problem will be shown soon. First, the fifth fact in this report now becomes obvious: only those employers who have employees who owe the *secret* tax Congress imposed in section 3402 were made liable for the payment of that tax in section 3403!

SUMMATION: This report has proven Congress used its taxing powers to impose a tax in section 3402 of our tax code. Then Congress disguised this tax and improperly named it to make it appear to be the employee's income tax. The law itself proves the tax imposed in chapter 24 is not the employee's income tax but may be used by an employee as a credit against the employee's income tax. The law as written by Congress has never required employers to collect income tax; yet, IRS regulations claim employers are required, by law, to withhold income tax from employee's wages; and, employers are liable for those taxes whether or not they are collected from employees. Not only is this information false, the law, as enacted by Congress does not apply to anyone. The fact the *secret* tax is allowed, by law, as a credit against an employee's income tax does not infuse any new life blood into this dead law. Congress may give employees gold plated Cadillacs if it wishes. The granting of such benefits to employees by Congress does not, by such fact, impose taxes on employers.

The *secret* tax can now be fully exposed: it is known to every IRS agent as *withholding* tax. This closes this argument with the now inescapable truth: The Internal Revenue Service has lied to employers about how our employment taxes were designed and how they function. You now know why the Commissioner of Internal Revenue can loudly proclaim, as he has in the Annual Report he produced for Congress in 1987: "**THE BASIS OF OUR SELF-ASSESSMENT SYSTEM OF TAXATION IS VOLUNTARY COMPLIANCE WITH TAX LAWS.**" When an employer takes an IRS form 941, EMPLOYERS QUARTERLY FEDERAL TAX RETURN, and fills in the line which reads

"Total wages and tips **subject to withholding**, plus other compensation," he is telling the Commissioner he has employees who owe **withholding** tax (the code word for the *secret* tax) without knowing he is participating in the biggest con game ever created in the history of man. When the employer then fills in the next line which reads, "Total income tax withheld from wages, etc.", he is telling the Commissioner he is using the option provided in section 3402(c) which begins with the words, "At the election of the employer..." The only authority the Commissioner has to collect *withholding* tax from any employer is his own rules, the Regulations of the Secretary of the Treasury and the willing participation of the employer. The final switch is then made by the IRS when the *withholding* tax (which IRS has led everyone to believe is the employee's income tax) is assessed and credited into the employer's tax account, not the tax account of the employee! IRS agents know employees are not liable for the payment of *withholding* tax.

The final Coup de Grace was applied to this tax law at its inception by Congress itself when it wrote the imperative into the law in section 3402, "every employer making payment of wages shall deduct and withhold **upon** such wages a tax..." This imperative, as Congress enacted it into law, is absurd! It is impossible for any person to follow the order, "deduct and withhold upon such wages a tax." This is not just a question of semantics or a linguistic slip. This gibberish allowed the members of Congress to walk away from enacting this law without actually using their power to order employers to steal money from employees. That onus was left to the Secretary of the Treasury who, possibly without realizing this tax law was already fatally flawed, changed his Regulations to read as follows:

§31.3403-1 Liability for tax.

Every employer required to deduct and withhold the tax under section 3402 **from** the wages of an employee is liable for the payment of such tax whether or not it is collected from the employee by the employer.

If you will look back at the comparison of section 3402 in the law with the corresponding regulation you will see another example of the Secretary of the Treasury changing the law which contains the unfunctional word **upon** to the way he must have the law read with the word **from** if it is to be enforced. If you are having problems with this switch in the use of a four letter word, try this problem in your calculator. When a single person earns wages of \$1,000.00 in a given month, IRS Publication 15, Employer's Tax Guide, says the amount of income tax to be withheld shall be \$114.00. Now put the figure for the wage into your calculator and then figure out how you are going to deduct **upon** such wage a tax of \$114.00. As stated above, the imperative given to employers by Congress when it enacted section 3402 of Chapter 24 of our tax code into law, is absurd! The best solution is for The Supreme Court of the United States to declare this law unconstitutional. That would be the most appropriate:

End of

THE SECRET TAX